IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 520 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MULUBHAI RANCHHODBHAI KOLI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 520 of 1992

MR H N Joshi for Mr PM THAKKAR for appellants

Mr K P Raval, APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE D.P.BUCH

Date of decision: 11/12/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE D.P.BUCH)

This is an appeal under section 374 of Criminal Procedure Code against the judgment and conviction order dated 30.4.1992 recorded by learned Addl.Sessions Judge, Amreli in Sessions Case No.53/90 under which the learned Sessions Judge convicted the aforesaid appellants for offence punishable under section 302 read with section 149 of IPC and sentenced them to suffer rigorous imprisonment for life and to pay a fine of Rs.1000/-. The learned Addl.Sessions Judge further directed that in case the appellants do not pay the amount of fine, then they should further undergo rigorous imprisonment for a period of six months. Appellants No.4 and 5 have further been convicted for an offence punishable under section 37(1) read with section 135 of the Bombay Police Act and each of them has been sentenced to suffer rigorous imprisonment for six months and each of them is directed to pay fine of Rs.250/- in default of payment of fine, each of them has been directed to further undergo rigorous imprisonment for 15 days. The learned Addl.Sessions Judge did not award separate sentence for the offence punishable under sections 147 and 148 of IPC. The learned Judge further directed that the sentence as above shall be run concurrently.

2. The facts of the case leading to the above judgement and conviction order against the appellants above named may be briefly stated as follows:

The original informant Diwaliben-Exh.26 is the widow of deceased Mohanbhai Bhana, who was allegedly murdered by the appellants above named on 18.4.1990 at about 10.30 a.m. on the way between village Dedan and Munjiyasar of Rajula Taluka in Amreli District. It was the case of the prosecution before the trial court that the deceased Mohanbhai was the husband of informant Diwaliben. That, on the date of the aforesaid incident, informant Diwaliben was staying with her deceased husband Mohanbhai at Munjiyasar village. That on the aforesaid date, aforesaid deceased Mohanbhai had gone to village Dedan for purchasing sugar and other grocery articles. The prosecution further alleged that the only bus from village Dedan would normally arrive at 10 a.m. That therefore, informant Diwaliben went to the bus stand to see the deceased coming from the said bus. The bus had arrived but the deceased did not alight from the said bus and, therefore, informant Diwaliben started going on foot towards village Dedan. On the way, she saw the deceased coming from the opposite direction. He had a vessel containing oil in his hand. He had also a bag of sugar

on his head. When the deceased was at a little distance from informant Diwaliben, it was noticed by her that the appellants above named were found hidden behind a hedge and they all got up and rushed towards the deceased. The deceased saw the appellants rushing towards him. At that time, Appellant No.4 Manubhai Koli had spear with him and appellant Lakhmanbhai had got an axe in his hand. The prosecution has further alleged that since the deceased saw the appellants rushing towards him with weapons, as aforesaid, in their hands, the deceased threw the head-load on the ground and he also threw the oil jar. That thereafter the deceased tried to run away from the spot towards eastern direction. The prosecution further alleged that the appellants chased the deceased and in the meantime, appellant-Lakhmanbhai was the first to reach and overtake the deceased. In the meantime, other four appellants also reached there. That thereafter appellant-Lakhmanbhai dealt axe blow on the head of the deceased and that at that time, the deceased raised shouts and in the meantime, appellant Lakhmanbhai dealt another axe blow on his hand. That at that time, informant Diwaliben also raised shouts and requested the appellants with folded hands not to beat her husband. That the appellant did not pay any heed to the said request and all the five appellants continued to beat the deceased at random and indiscriminately. That after some blows being inflicted on the person of the deceased, the appellants ran way from the spot.

3. The prosecution has further alleged that injuries on the person of the deceased were bleeding and the blood was oozing and emerging out of those injuries. That informant Diwaliben waited there for some time but none had come at the spot and therefore, the informant covered the body of the deceased with a cloth and went to her residence and informed about the incident to one Devshibhai and told him to call her son Pragjibhai, who has gone to the field. That thereafter, she again went to the scene of offence. That, Pragji, her son had also arrived there. He went to village Dedan and got a tempo (motor vehicle). That the deceased was taken in the said tempo to the dispensary at Rajula. The informant had also accompanied the deceased. That by the time they reached the dispensary at Rajula, the Doctor examined the deceased and declared that the deceased had already died. That in the meantime, the deceased was unconscious but his body was warm and, therefore, the informant felt that the deceased was alive. Thereafter, the police had come to the said dispensary at Rajula and the informant lodged FIR before the police at the said dispensary. The prosecution has alleged that there was some dispute about

right of passage between the deceased and the appellants and, therefore, the appellants had intentionally caused murder of the deceased. That even two years back the appellants had beaten son of the deceased and a complaint was filed against the appellants for the said purpose. That even a Civil Suit was also filed against the appellants-Manubhai and Lakhabhai.

4. On receiving the FIR, the Investigating Officer proceeded to investigate the case. Panchnama was drawn in respect of the spot of the offence. The oil tin was seized from the spot. Oily mud was also collected from the spot. Other muddamal articles were also seized. The appellants were arrested and were sent to the learned Magistrate in judicial custody. Statements of witnesses were recorded, Post Mortem note was collected from the Doctor who had performed postmortem of the deceased. After conclusion of the investigation, the Investigating Officer submitted charge-sheet before the Court of learned Judicial Magistrate First Class. Since the offence punishable under section 302 of IPC was exclusively triable by the Court of Sessions, the learned Magistrate committed the case against the appellants to the Court of Sessions. There the copies of investigation papers were supplied to the appellants, charge prepared at Exh.1 was framed against the appellants for offence punishable under section 302 read with sections 147, 148 and 149 on 29.10.1991. Charge was also framed against them for offence punishable under section 37(1) read with section 135 of the Bombay Police Act for committing violation of the notification issued by the District Magistrate for not carrying weapons in public places. The charge was read over and explained to the appellants, who pleaded not guilty to the said charge in the statements recorded by the learned Judge. Thereafter, the learned Addl.Sessions Judge proceeded to record the evidence produced before him by the prosecution. It appears from the record that the prosecution had examined the following witnesses before the trial court:

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i. PW 1 Ratilal Shamaji, Circle Inspector who prepared the map of the scene of the offence Exh. 24

ii. PW 2 Diwaliben, informant and wife of the deceased - Exh.26

iii. PW 3 Sompuri Rampuri Exh.28

iv. PW 4 Dr. Popatbhai Naran Bhaliya Exh.29

v. PW 5 Devshibhai Exh.32

vi. PW 6 Pragjibhai Mohanbhai Exh.34

vii. PW 7 Mangan Mohanbhai Exh.38

viii. PW 8 Nathabhai Naranbhai Exh.39

ix. PW 9 Premjibhai Exh.41

x. PW 10 Ranchhodbhai Iswarbhai Exh.44

xi. PW 11 Udaypuri Lalpuri Exh.45

xii. PW 12 Prithviraj Tapubhai Exh.46

xiii. PW 13 Usmarbhai Ishwarbhai Exh.48

xiv. PW 14 Hakumesih Jorubha Exh.50

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5. After conclusion of evidence, the learned Addl.Sessions Judge recorded further statements of the appellants under section 313 of the Cr.P.C. He examined the evidence appearing against the appellants on record and sought explanation from the appellants if they wanted to say something. After recording further statements of the appellants, the learned Addl.Sessions Judge heard the arguments advanced by the parties. Thereafter, the learned Addl.Sessions Judge found that the prosecution had successfully established the commission of offence by the appellants and, therefore, the appellants were convicted by the learned Addl.Sessions Judge for the offence punishable under section 302 read with sections 147, 148 and 149 of IPC and sentenced them to suffer R.I. for life and to pay Rs.1000/-. The learned Judge also convicted appellants No.4 and 5 for the offence punishable under Section 37 (1) read with section 135 of Bombay Police Act and sentenced them to suffer R.I. for six months and to pay fine of Rs.250/-.

6. Feeling aggrieved by the said judgment and conviction order dated 30.4.1992, the appellants have preferred this appeal before this Court. It has been mainly contended here that the learned Addl.Sessions Judge has committed serious error in depending upon the testimony of Diwaliben. That the learned Judge ought to have found that Diwaliben was a chance witness at the place of offence and her evidence was not natural. That the learned Addl.Sessions Judge has not properly

appreciated the fact that there was no motive proved on record. That even the conduct of informant Diwaliben at the time of the incident was quite unnatural and that has been overlooked by the learned Judge, that even the evidence of Diwaliben that the deceased was carrying head-load sugar has not been established by the panchnama of the place of evidence wherein sugar has not been found on the spot and has not been attached by the Investigating Officer. That on the whole, the judgment and conviction order recorded by the learned Addl.Sessions Judge are illegal and erroneous and deserve to be set aside. The appellants, therefore, pray that the present appeal be allowed, the judgment and conviction order be set aside and the appellants be acquitted and set at liberty forthwith. On receiving the appeal, it was ordered to be admitted and bail was refused on 1.10.1992.

7. We have heard the arguments advanced by Mr H N Joshi on behalf of Mr P M Thakker, learned Advocate for the appellants. We have also heard the arguments advanced by Mr K P Raval, learned APP for the State. Learned Advocates for the appellants as well as for the respondent have taken us through the entire evidence on record including documentary and oral evidence. They have also taken us through the judgment delivered by the learned Addl.Sessions Judge.

8. It is very clear that the case of the prosecution substantially rests on the evidence of Diwaliben-exh.26 who is the solitary eye witness to the incident in question. It is an admitted position that non else was present when the incident took place. It is also a matter of record that as per her evidence at Exh.26, deceased Mohanbhai had gone to village Dedan for purchasing household articles. It is also her evidence that the bus arrived at 10 a.m. and she had gone to the bus stand but the deceased did not alight from the bus. Therefore, she proceeded ahead on foot towards the direction of village Dedan. That when she crossed some distance, she saw her deceased husband coming from the opposite direction carrying on headload of sugar and oil tin in his hand. In the mean time, the appellants were found hiding themselves behind a hedge and they ran towards the deceased. It is also her evidence that the deceased saw the appellants rushing towards him with dharia, axe and spear. That therefore, the deceased threw the head-load and oil container and tried to run away from the spot. She, further deposed that the appellants chased the deceased and they could overtake the deceased very soon. That thereafter, the appellant

Lakhmanbhai dealt two axe blows on the head of the deceased and thereafter other appellants also had caused injuries at random and indiscriminately on the person of the deceased. She has stated that she requested them not to beat her husband but the appellants did not pay any heed to the said request and after beating the deceased extensively, the appellants ran away from the spot. Thereafter, she waited for a while but nobody turned up the spot and, therefore, she went home and informed about the incident in question and also requested one Devshibhai to call her son Pragjibhai from Wadi. That Pragjibhai arrived there and thereafter he brought a motor vehicle from Dedan in which the deceased was carried to Rajula for treatment but Doctor at Rajula declared that the deceased had already died.

9. This witness has been cross examined at length by the learned Advocates appearing for different appellants before the trial court. Efforts were made to show that she was not an eye witness and she had simply reached the spot after learning about the death of her husband subsequent to the incident in question and she was, therefore, not a witness to the incident. On going through the cross-examination of the witness, it is clearly noticed that her evidence has not been shaken to any extent during the very lengthy cross-examination undertaken by the learned Advocates for the appellants. She has stood the test of the cross examination and all suggestions have been negatives by her. Even with respect to the motive, she has given evidence. She has further stated that on an earlier occasion her son Pragjibhai was beaten up by the appellants and a case has also been filed and was pending against the appellants. She has further stated that a Civil Suit has already been filed against at least two appellants. Therefore, her evidence has been relied upon by the learned trial Judge.

10. The evidence of the witness has been supported by the evidence of Devshibhai and Pragjibhai. They both have corroborated the testimony of informant Diwaliben. Her evidence has further been supported by the evidence of Medical Officer Dr. Popatbhai N Bhaliya at Exh.29 who has deposed that when the post mortem was carried out, it was noticed that the deceased had so many injuries on his person. The injuries noticed by the Medical Officer on the person of the deceased may be reproduced as follows:

(i) Incised wound of 1"x1/4" bond deep middle part of forehead.

(ii) Incised wound of 3"x1" by bond deep on skull.

Fracture of skull oblique right side of forehead. Fracture of skull, Right side of temporal bond, anti posterior.

(iii) Multiple factures of left Ulna and humerus at lower part of arm,

(iv) Fracture of left ulna & radius of upper head,

(v) C.L.W. lateral aspect of left thigh -
Size : 3" x 1/2" x 1/2"

(vi) C.L.W. lateral aspect of left thigh
Size: 2 1/2" x 1" x 1"

(vii) C.L.W. size 1" x 1/2" bone deep on chin of left tibia
C.L.W. size 2" x 1" bone deep below above injury

(viii) C.L.W. 1/2"x1/2" x bone deep, right side of lower leg

(ix) incised wound on temporal region right side of skull size: 2"x1" x Bone deep

(x) Fracture of tibia and fibula of both legs

(xi) Evident of fracture of humerus and radius of ulna right side

(xii) Evident fracture of temporal bone

(xiii) Incised wound in brain tissue. Right side of brain tissue Size: 3"x1/2"x1" bone deep in brain tissue

On internal examination, it was noticed that there was fracture on right side of temporal bone and right side of skull, Size: 3"x1"xBone deep. It was also noticed that there was incised wound in brain tissue - Right side of brain. Size 3"x1/2"x1" bone deep in brain tissue. Doctor has certified the cause of death of the deceased to be due to injury of vital organ i.e. brain, during the course of his evidence. Doctor has also deposed that both the lungs of the dead body of the deceased were full of blood but the stomach was empty. It has also been testified by him that all the injuries were anti mortem. It has further been deposed by him that injuries No. 2, 9 and 13 were possible with one single blow and that the said weapon would be a sharp edged instrument. On seeing the muddamal weapons, he has deposed that the said

injuries could be caused by the said weapons. He has again deposed that muddamal weapons, dharia and spear could cause the said injuries. He has produced the post mortem note signed by him at Exh.31.

11. This witness has also been cross examined at length on behalf of the appellants by their learned Advocates. However, the evidence of this witness has remained unshaken during the course of cross examination.

12. This evidence has further been supported by the evidence of Devshibhai at Exh.31. According to his evidence, he was at his residence at the relevant point of time. He happens to be the nephew of deceased Mohanbhai and both of them have been staying in adjoining houses. He has deposed that on the date of incident, his health was not good and, therefore, he was at his home. That informant Diwaliben had come to him at about 11 a.m. in the morning and had told him that the appellants had beaten the deceased. That informant also told him that the appellant Lakhmanbhai had beaten the deceased. Thereafter, he went to the field where son of the deceased Pragjibhai was working. He had conveyed the information given by Diwaliben and also told him about the place where the incident took place. Thereafter Pragjibhai went to the spot in the company of his younger brother Govindbhai and thereafter the witness came to know that the deceased had died.

13. This witness has also been cross examined at length but nothing more could be derived from the cross examination. An attempt was made to show that this witness thereafter, did not convey this information to anyone else. He has deposed that since his health was not good he was at home and even he went to the field to inform son of the deceased, Pragjibhai, and after informing Pragjibhai, he returned home and he was again relaxing. Therefore, he had no occasion to inform about the said incident to anyone else. Moreover, his health was not good. It was not necessary for him to move out frequently from his residence and he had no occasion to pass the information to anyone else. His statement was recorded on the very next day. This has clearly supported the case of informant Diwaliben and, therefore, his evidence has been relied upon by the learned Addl.Sessions Judge.

14. PW 6 Pragjibhai, son of the deceased has been examined at Exh.34. According to his evidence, he and his brother had been at their field and that their father had gone to village Dedan at 7 a.m. to purchase

household articles, that at about 11 a.m. Devshibhai had approached him at his Wadi and informed him that five people had beaten his father (deceased) and was lying in pool of blood. He has further deposed that the said information was conveyed to Devshibhai by his mother Diwaliben. Thereafter the witness along with Govindbhai had gone to the spot. He noticed that Diwaliben was present at the spot. He also noticed that the deceased in an unconscious condition lying in a pool of blood. He, thereafter, went to Dedan and brought a private vehicle for carrying the deceased to the hospital and the deceased was taken to the hospital at Rajula. Doctor examined the deceased and according to the evidence of this witness the Doctor announced that the deceased had already died. This witness clearly corroborated the testimony of Diwaliben and Devshibhai.

15. So far as the other witnesses are concerned, Ratilal exh.24 is a Revenue Circle Inspector who had drawn the sketch of the scene of offence. He has produced it at Exh.25 which shows that the place of offence is really on the way to village Dedan. It is an open place by the side of the road. Even thereafter panch and other witnesses have been examined and panchnama with respect of the scene of offence has also been brought on record. Manganbhai at Exh.38 is a panch witness but he has not supported the prosecution and, therefore, he was treated hostile by the prosecution. The witness at Exh.39 has also turned hostile. He has not supported the case of prosecution.

16. Then the evidence of Premjibhai Bhikhabhai at Exh.41 says that appellant Manubhai was present in the police station and he had told him that a spear hidden by him would be discovered by him. That thereafter panchnama was drawn and his signatures were obtained. That thereafter they all went in a police vehicle to a spot from where appellant Manubhai had produced the spear before the police which was hidden in an embankment. That it was stained with blood, that the said spear was seized by the police and panchnama was also drawn. The said witness identified the spear before the court and also identified his signature. The witness further said that appellant Lakhmanbhai was present and that he volunteered to discover the axe hidden by him. Preliminary panchnama was drawn and appellant Lakhmanbhai took them to his Wadi. That muddamal axe was hidden in a hedge at his Wadi which was taken out by the said appellant from the hedge and produced before the police which was stained with blood. The said axe was also identified by the witness and he also identified his

signatures in the paper slip affixed on the said axe.

17. This witness was also cross-examined at length and efforts were made to show that the two appellants did not make the discovery of the said weapons. However, the efforts failed and the witness stood the test of cross examination and stuck to the panchnama of muddamal at Exhs. 42 and 43. The prosecution examined Ranchhod Ishwarbhai at Exh.44. He is witness to the panchnama regarding discovery of other weapons. However, he has not supported the case of the prosecution. Same way, Udaypuri Lalpuri has also not supported the prosecution. Prosecution witness Prithviraj at Exh.46 has also not supported the case of prosecution. Any way, the fact of discovery of the said weapons by the concerned appellants has been duly established by the prosecution.

18. Next witness Umarbhai Ishwarbhai at Exh.48, had recorded the FIR lodged before him by the informant. His evidence is followed by evidence of P.S.I. Zala, who had carried out the investigation. He has clearly corroborated the testimony of the aforesaid panch witness in whose presence the discovery of the said two weapons was made.

19. On appreciation of the evidence of the informant and the evidence of Devshi and Pragjibhai as well as evidence of the said panch witness and the evidence of the I.O., the learned Addl.Sessions Judge found that the evidence is reliable and trustworthy and, therefore, the learned Judge relied upon the said evidence and convicted the appellants. During the course of arguments, learned Advocate for the appellants, Mr H N Joshi appearing for Mr P M Thakkar submitted that the evidence of Diwaliben should not have been accepted by the learned Judge and the learned Addl.Sessions Judge has committed serious error in depending upon PW 2, wife of deceased Mohanbhai. Therefore, this Court should not believe the testimony of the said witness.

20. It is very clear that if the evidence of Diwaliben is not accepted, there would be hardly any evidence by which the appellant could be convicted. PW 2 is the solitary eye witness to the incident in question. Learned Advocate for the appellants argued at length that the evidence of Diwaliben should not be relied upon. The written argument has also been submitted at the conclusion of the arguments. As narrated hereinabove, Diwaliben has clearly deposed that her husband had gone to fetch household articles to village Dedan. Her

evidence has been supported by evidence of Devshibhai. This witness has said that Diwaliben had gone to the bus stand. The deceased was to come by a particular bus and when the deceased has gone to buy grocery items, it is natural that his wife would like to share the burden of her husband. This can be done only if he goes to the bus stand. It is very pertinent to note that the bus used to arrive at village Munjiyasar at about 10 a.m. and, therefore, it was quite natural that Diwaliben had gone to the bus stand for sharing the burden of her husband. She has further said that when her husband did not arrive by the said bus, she started going on foot towards the direction of village Dedan to help her husband. It is nobody's case that the distance is not walkable. In that view of the matter, when the evidence is that she had proceeded on foot towards village Dedan, her evidence is quite natural and trustworthy.

21. Then it has been argued that there was enmity between Diwaliben and the appellants and, therefore, the evidence of Diwaliben should not be believed. Now the enmity goes in two ways. If there was enmity, the appellant had motive to kill the deceased also. Moreover, it is a matter of fact that earlier criminal case was filed against the appellants. It is also a fact that on account of the dispute of right of passage between the parties, a Civil Suit was also filed against the appellant. This shows that neither the deceased nor Pragjibhai nor Diwaliben had taken law in their hands and they had proceeded according to law i.e. at the first instance criminal case was filed and at the second instance Civil case was filed. This shows the attitude and conduct of the deceased, Pragjibhai and informant Diwaliben. Simply because there was enmity between the deceased and the appellants, the evidence of Diwaliben should not be rejected.

22. It has also been argued that Diwaliben is an interested witness. It is true that the deceased was her husband. There cannot be any dispute about the same. But when she was the solitary witness and when there was no likelihood of anybody being present to witness the events, it cannot be said that the Court cannot believe the evidence of this solitary witness and it should outright be rejected.

23. It is nobody's case that the other persons were present or likely to be present when Diwaliben saw the incident. She raised shouts but nobody arrived even after the incident was over. This shows that there was no other person present at the scene of offence and none

had arrived even subsequent to the time when the appellants left the spot. In that view of the matter, when there was no possibility of any independent witnesses, the testimony of Diwaliben cannot be rejected on the ground that she was an interested witness in the case. Learned Advocate has also argued that the other independent witnesses were available to the prosecution but they have not been examined. In fact, none was present to witness the event. None had arrived at the spot and, therefore, this argument is also not acceptable. It is not pointed out as to who was present at the place of the incident or soon thereafter.

24. It has also been contended that the FIR has been filed five hours after the incident took place. It has to be considered that village Munjiyasar is not a place where police station has been located. After the incident, Diwaliben went home and informed Devshibhai. Devshibhai went to Wadi to inform her son and her son arrived at the spot and saw his father in unconscious state lying in a pool of blood and he went to village Dedan and brought a motor vehicle and the deceased was carried in the said vehicle to Rajula and FIR was filed there. Considering the entire episode, it cannot be said that there was delay in filing the FIR. All the factors between the commission of offence and lodging of FIR are required to be taken into account and once these factors are taken into consideration, it cannot be said that there was delay in filing the FIR and even if there was some sort of delay, it cannot be treated to be fatal to the case of the prosecution.

25. It has then been argued by Mr Joshi that the entire story of informant Diwaliben is not natural, since the deceased could not have run with headload of sugar and oil jar in his hand. Diwaliben has clearly deposed that as soon as the deceased saw the appellants rushing towards him having weapons in their hands, he threw headload and oil jar and then started to run away. This shows that the deceased never even tried to run away with headload and oil jar with him. Moreover, oil jar has been found from the spot and mud has also been seized showing the presence of oil in it. So far as sugar is concerned, it has not been seized on the spot. It may be that it being an open place, somebody must have come there and taken it away after the deceased was taken to the hospital. Therefore, this is not a ground for rejection of the testimony of Diwaliben.

26. It has also been contended that the assault was committed from back side and the injuries were found on

the front side of the body and, therefore, the evidence tendered by Diwaliben is not natural. It has not been deposed by Diwaliben that the appellants assaulted the deceased from his back. The evidence is that the appellants overtook the deceased and then assaulted him. This shows that the assault was from the front and not from back side of the deceased.

27. It has further been argued by Mr Joshi, learned Advocate for the appellants that the conduct of Diwaliben on the spot was unnatural as she has stated that she has raised shouts and requested the appellants with folded hands not to beat the deceased. However, the appellants did not pay any head and continued to beat the deceased. It has also been argued that the informant did not rush to the village. Now the distance was not that less and she was a woman and her age at the time of the event was around 60 years. Therefore, she had some limitation in running back to the village. In the meantime, the incident was over and the appellants had run away from the spot. Therefore, this conduct of the eye witness cannot be treated to be unnatural. It has also been argued by Mr Joshi that the prosecution has not explained as to how the appellants knew that the deceased would come at that particular spot on that day. It may be that the appellants or some of them had seen the deceased going by bus in the morning to village Dedan. It is not much in dispute that the bus used to arrive at village Munjiyasar only once in a day at 10 a.m. Even otherwise, they may not have any previous intimation. However, at the time when the deceased was seen coming from village Dedan on foot then the appellants took chance seeing that none was there in the near vicinity. Therefore, simply because there is no evidence on the point as to how the appellant knew that the deceased was likely to come to the spot, the evidence of Diwaliben cannot be rejected.

28. It has further been contended that appellants No. 1 to 4 had not caused serious injuries on the vital organs, to the deceased. However, even if they have not committed serious injuries, the offence would not be less than the one punishable under section 302 of IPC because they all have rushed to the deceased and simultaneously started hitting and beating the deceased with deadly weapons. All have caused serious injuries to the deceased indiscriminately and at random. Looking to the manner in which the injuries were caused on the person of the deceased and looking to the injuries caused to him, it is clear that there was unlawful assembly with a common object to kill the deceased. In that view of the matter, the appellants were clearly guilty of committing

offence punishable under section 302 read with sections 147, 148 and 149 of IPC. Since all the appellants had assaulted the deceased at a time, all may not have an opportunity to cause injuries on the vital part of the body of the deceased person. They may have caused injuries to the deceased in accordance with the opportunity available to them. Therefore, it is not possible to hold only one appellant guilty of offence punishable under section 302 and rest of them for offence punishable under section 304 Part I or part II of IPC. It has also been argued that the discovery of weapons has not been proved with respect to three appellants. There cannot be any dispute that panch has not supported discovery of the weapons used by the appellants, but it does not mean that they should be acquitted outright simply because discovery panchnama has not been proved. Discovery panchnama under section 27 of the Evidence Act would certainly link the accused with the crime but if discovery panchnama has not been proved, it would not mean that the accused should be acquitted and benefit of doubt should be extended to them.

29. It is further contended by Mr Joshi that appellant no.1 was aged 61 years at the time of the incident and it is highly improbable for such an old person to beat the deceased with dharia. This is not an important factor. Strength of a person is very relevant. It is not on record that appellant No.1 was physically weak or otherwise handicapped and could not commit any offence or he could not rush to chase the deceased. Therefore, this argument is also not acceptable. It is further contended that appellants No.1 and 2 are the real brothers and appellant no.3 is also a family member of appellant no.1. Appellants No.4 and 5 are also real brothers and, therefore, all the members of the family have been shown as involved in the offence. Now simply because the appellants are members of one family, it cannot be said that they have been wrongly involved. Here we have to decide the matter on evidence on record and evidence on record clearly leads to the guilt of the accused and, therefore, simply because they belong to one family, there is no reason to reject the testimony of the eye witness.

30. Learned Advocate for the appellants has further contended that a field belonging to one of the appellants is very near to the place of the event. In that event, the appellants may have initially gathered together accidently or incidently without any intention to commit murder of the deceased. They might have noticed the deceased coming in that lonely place and, therefore, they

formed an unlawful assembly with a common object to cause murder of the deceased. Therefore, they rushed towards the deceased with weapons in their hands and caused injuries to the deceased. In above view of the matter, we are of the opinion that the learned Addl.Sessions Judge has not committed any illegality in depending upon the sole testimony of Diwaliben, whose evidence has been supported by medical evidence, discovery panchnama, panch of discovery panchnama, Devshibhai and Pragjibhai. Even the fact that the oil jar was seized from the spot very clearly supports the evidence of Diwaliben. Same way, the earth and mud collected from the spot containing oil elements further supports the version given by Diwaliben. In above view of the matter, we are of the opinion, that the learned Addl.Sessions Judge has not committed any error in appreciation of evidence. It is well settled that when the court is in general agreement with the findings and reasonings of the trial court then it is not necessary for the appellate court to go into detailed discussion and lengthy reasonings which would amount to repetition of what has been said by the trial court on this aspect. Hence we are fortified by a decision in the case of State v. Mansukhlal, reported in 1993 (2) GLH 849.

31. We can turn to the citations shown on behalf of the appellants.

31.1. In the case of Sarwan Singh v. State of Punjab reported in AIR 1957 SC 637, it has been laid down that mere suspicion is not enough and there is a clear demarcation between 'may be true' and 'must be true'. There cannot be any dispute about the said principle. In the present case, the evidence of the eye witness is found to be reliable and in that event, it cannot be said that the appellants should be extended benefit of doubt. Moreover, in the present case, the fact has been proved beyond reasonable doubt and, therefore, it cannot be said that the allegation against the appellants 'may be true'.

31.2. In the case of Devidas & Few ors. v. The State of Maharashtra (1981 Cr.L.R.(Mah.) 226 (sic.277), it has been laid down that if a discovery panchnama has not been preceded by initial statement then such an evidence would not be admissible. This decision will not apply on the facts of the case before us. Here in this case, before going for discovery panchnama, the concerned accused person had made statements before the police in presence of panchas and the weapons have been discovered on the strength of the said statements when the concerned appellant took the police and panchas to the spot where

muddamal articles were hidden.

31.3. In the case of Badri v. State of Rajasthan, (AIR 1976 SC 560) it has been laid down that if it is found that a witness has modulated his evidence to suit a particular prosecution theory for the deliberate purpose for securing a conviction, then such a witness cannot be considered as reliable person and no conviction can be based on his sole testimony. This decision may not apply to the facts of the case before us. The reason is that when the informant lodged the FIR, she had no idea as to what would be the medical evidence after the post mortem of the deceased. Therefore, it cannot be said that she has modulated her version so as to suit a particular prosecution theory with a view to obtain conviction against the appellants.

31.4. In the case of Ram Jag v. State of U.P. (AIR 1974 SC 606) it has been laid down that delay in filing FIR would be fatal in some cases. This would depend upon the facts of each case. In the present case, looking to the distance between the place at which the incident took place and the place at which the police station is located, it cannot be said there was inordinate delay in filing the FIR and in the meantime, the informant had time to modulate her case to suit the prosecution case. In fact, son of the deceased had gone to village Dedan for bringing a motor vehicle, the motor vehicle arrived at village Munjiyasar and there the dead body of the deceased was placed in the said vehicle and it was taken to Rajula hospital and there the FIR was lodged. Looking to the above facts, there is absolutely no delay on the part of the informant in filing the FIR.

31.5. Case of B N Singh v. State of Gujarat (AIR 1990 SC 1628), was related to an interested witness and it was noticed that one accused was falsely implicated in the matter. These are not the facts in the case before us and, therefore, the said decision will not apply to the case before us.

31.6. Even the case of Machander v. State of Hyderabad (AIR 1955 SC 792) is also on a different subject. There the observation was that the accused should be given appropriate opportunity to meet with the facts appearing in evidence against him while recording further statements of the accused. There is no argument that such an opportunity was not afforded to the appellants when the further statements were recorded under Section 313 of the Code of Criminal Procedure, 1973.

31.7. In the case of Mer Vaja Meraman v. State (1988(2) GLR 1057), it has been laid down that panchnama is not a substantive piece of evidence. It can be used for the corroboration to the evidence of panch witnesses. In the present case, one discovery panchnama was proved by the evidence of panch witness and, therefore, the said panchnama has been and could be used against the appellants for corroborating the oral testimony of panch witness.

31.8. In the case of State of U.P. v. Jamshed & Anr. (1994 SCC (Cri,) 625), two accused persons were being prosecuted. One of them had a fire arm and the injury caused with it was fatal. So far as the another accused is concerned, the injuries caused by him were simple. There was no material to show that the second accused had information or knowledge that the first accused had fire arm with him and he was likely to use the same. In that view of the matter, it was not a case of an offence under section 302/34 of IPC against the second accused and, therefore, he was convicted for offence under section 324 of IPC. The facts are different in the case before us. Here all the appellants were armed with deadly weapons and all had used their weapons for hitting the deceased and, therefore the said decision will not apply to the facts of the case before us.

31.9. In the case of Babubhai Ranchhodbhai Patel v. State of Gujarat (AIR 1994 SC 1400), the matter related to sudden quarrel and, therefore, it was not found to be a matter in which the accused can be convicted for offence punishable under section 302 of IPC. In the present case, there is absolutely no case of sudden quarrel. The appellants were ready with deadly weapons with them and on seeing them the deceased threw headload and the oil jar and tried to run away to save his skin. The appellants on seeing the deceased running away as above, chased him, they overtook the deceased and then caused fatal injuries on the person of the deceased. These facts clearly show that there is no question of convicting the appellants for offence punishable under section 325 of IPC.

31.10. The case of Jagannath & Ors. v. State of U P (1995 SCC (Cri.) 406) was a matter related to a different and peculiar facts and, therefore, the said decision will not apply on the fact of the case before us. Similarly, the case of Lal Mandi v. State of West Bengal (1995 SCC (Cri) 560) was a matter which went to the court of appeal from acquittal. The appellant had caused injuries by giving kick to the deceased which resulted in fracture of

ribs. The matter was discussed on facts and it was found that there was no cause for common intention and, therefore, the said accused was convicted for an offence punishable under section 325 read with section 34 of IPC.

31.11. As said above, the facts of the present case are quite different and looking to the peculiar facts of the case before us, there is no question of convicting the appellant for lesser offence. On the other hand, it is required to be considered that though the motive may be an important factor to be considered in each case, absence of motive will not be fatal to the case of the prosecution in all cases. Even otherwise, Diwaliben has given some idea about the motive in the present case. She has deposed that there was previous quarrel between the appellants and the deceased with respect to right of way. She has also stated that her son Pragjibhai was beaten by the appellants two years before the above incident and criminal case was also filed. She has further stated that there existed a quarrel with respect to right of passage and a Civil Suit was filed against the appellants - Mulubhai Koli and Lakhmanbhai. It is seen that there is evidence with respect to existence of motive in the present case also. As said above, the above decisions do not apply to the facts of this case. However, when the decisions were cited we have discussed them for the purpose of competing the judgment. Any way, it is quite clear that the prosecution has proved beyond any reasonable doubt and all the witnesses stood the test of cross-examination and their evidence has not been shaken to any extent. Learned Addl.Sessions Judge has given cogent reasons to hold the appellants guilty for offence under section 302 read with section 149 of IPC. We do not find any reason to take a different view from the view taken by the learned Addl.Ssssions Judge. Consequently, there is no alternative but to hold that the present appeal is meritless and, therefore, it deserves to be dismissed.

32. Before concluding, it may be stated at this stage that learned Advocate for the appellants has made it clear that appellant no.1 has been released from jail as he has already completed his sentence. We are not very much concerned with the same. He has also made a statement that appellant no.4 has passed away before about 2 years when he was on parole. In that view of the matter, when no request is made to prosecute the matter on his behalf and when the legal representatives have not been joined, the appeal of appellant no.4 stands abated. Learned Advocate for the appellants also stated that appellant no.2 was 56 years of age at the time of the

incident. This has hardly any importance.

33. In above view of the matter, there is no merit in the present appeal and the appeal is required to be dismissed. This appeal of appellants No.1, 2, 3 and 5 is ordered to be dismissed. The judgment and conviction order against them are confirmed. The appeal of appellant No.4 stands abated on account of his death.

Date:11.12.2001 [B J Shethna, J]

[D P Buch, J.]

msp